Supreme Court, U. S.
FILED
MAR 13 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1402

HUGH C. WILBOURN,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF LOUISIANA

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March 13, 1979

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF LOUISIANA

The petitioner, Hugh C. Wilbourn, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Louisiana entered in this proceeding on November 13, 1978.

OPINION BELOW

The petitioner herein was convicted of three counts of negligent homicide, La. R.S. 14:32, on March 31, 1977, by a jury in the Criminal District Court for the Parish of Orleans, Louisiana. A motion for a new trial was denied. Subsequently, petitioner filed a timely motion for appeal and provided assignments of errors. The Louisiana Supreme Court entered judgment affirming the conviction on November 13, 1978 and its opinion appears in 364 So.2d 995. A timely petition for rehearing was denied on December 14, 1978.

JURISDICTION

The petition for certiorari was filed within ninety (90) days of the December 14, 1978, date. The petition for rehearing was denied. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254.

QUESTIONS PRESENTED

1.) Did the search in the present case violate the 4th Amendment of the United States Constitution?

2.) Did the seizure in the present case violate the 4th Amendment of the United States Constitution?

3.) Did the New Orleans Police have any jurisdiction and/or legal right to search and seize petitioner's automobile?

4.) Did the jury selection process in this case violate petitioner's 14th Amendment rights of due process and equal protection?

STATUTORY PROVISIONS INVOLVED

The 4th Amendment of the United States Constitution.

The 6th Amendment of the United States Constitution.

The 14th Amendment of the United States Constitution.

Louisiana Code of Criminal Procedure Article 784.

STATEMENT OF FACTS

On September 21, 1975, three men were *killed* in an alleged hit-and-run incident on the *Bayou Bievenue bridge*. The petitioner, Hugh C. Wilbourn, was arrested and charged with the offenses.

On Monday, September 22, 1975, at about 4:15 P.M., St. Bernard Parish Deputies, B. Emmons and L. Gagliano were on routine vehicular patrol when they received radio dispatch to proceed to 513 Norton Avenue, Arabi, Louisiana and check for a brown late model Ford suspected of being involved in a hit and run. The source of this information was an anonymous telephone call received by the radio dispatcher.

At approximately 4:30 P.M., Deputies Emmons and Gagliano arrived by vehicle and stopped at the premises located at 513 Norton Avenue. Upon arriving, the officers observed a two-tone (white top, brown bottom) 1974 Ford parked under the carport. The right rear tire of the vehicle in the carport was flat, and its right rear bumper appeared to be damaged. The car was parked with its rear facing Norton Avenue. (See defense exhibits D-3 and D-4). The car and carport appeared to be empty.

The officers then entered the carport in order to obtain a view of the front of the vehicle in an effort to determine if the vehicle had in fact been involved in a hit and run. Once in the carport, the officers walked to the front of the vehicle and observed what appeared to be blood stains and *damage on* the front of the car. The front of the vehicle *could not* be seen from either the street or sidewalk.

Thereafter, the vehicle was impounded, without a search warrant, determined to be owned by defendant, Hugh C. Wilbourn. It was also determined that the defendant resided at 513 Norton Avenue.

Prior to entering the premises of 513 Norton Avenue, the police had neither an arrest warrant nor a search warrant. (MTS tr. pp. 12, 13 and 27). Evidence taken from the exterior of the car, and submitted to scientific analysis, was used at the trial of petitioner herein and was relied upon exclusively in order to prove his guilt.

REASONS FOR GRANTING THE WRIT

1.) The search conducted herein violated the Fourth Amendment to the U.S. Constitution.

It is now well settled under the Fourth Amendment to the United States Constitution that a search conducted without a warrant issued upon probable cause is per se unreasonable subject only to a few specifically established and well delineated exceptions, to-wit: searches made incident to a lawful arrest, so-called "plain-view" searches, made when an officer is where he has a right to be, consent searches, and searches made under exigent circumstances or in close pursuit. *Vale v. Louisiana*, 90 S.Ct. 1969, 399 U.S. 30 (1970). Because the instant search and seizure was nonconsensual (MTS tr. pp. 7, 8 and 27), was *not* made pursuant to a lawful arrest (MTS tr. pp. 14 and 15), and, in fact, involved no form of "close pursuit" (MTS tr. 18 and 27), the issue before this Honorable Court is whether the search can be upheld due to the existence of exigent circumstances or under the "plain-view" doctrine.

It should be noted initially that the specific issue before this Court is whether the police had the right to be where they were when they observed the alleged evidence on the *exterior* of the car. This is to say that because the front exterior of the vehicle could *not* be seen from the street or outside the boundaries of 513

Norton (MTS tr. pp. 8, 9 and 26; def. exh. D-3 and D-4), the officers must have had the right to enter the carport and place themselves in front of the vehicle *prior* to viewing the evidence.

With respect to the officers' right to enter the carport without a warrant, the first question that must be discussed is that of the application of Fourth Amendment protection to an area adjacent to a house. It is, of course, well settled that it is an individual's right to privacy, not a specific place, which is protected by the Fourth Amendment. *Katz v. United States,* 88 S.Ct. 507, 389 U.S. 347 (1967). The central question to be asked is: What was the defendant's expectation of privacy? The facts in the instant case demonstrate that the position of the carport and car were such that anyone so parking the car could reasonably expect the carport to be free from police intrusions.

The car and carport in question were clearly on the premises of 513 Norton. (MTS tr. pp. 12 and 31) An examination of defense exhibits D-3 and D-4 demonstrates that the carport was recessed such that the front boundary of the carport was farther from the street than was the front of the house. Moreover, the carport was fully connected to the house on one side and enclosed by a cement fence on the other. The car itself was parked such that its front bumpers were as close to the back wall of the carport as possible thus positioning the vehicle completely within the confines of the carport.

It should be noted that the carport was used only by the residents of 513 Norton and was not part of an apartment complex. Furthermore, it was not necessary to walk through the carport in order to enter the front door of the residence. (See def. exhibit D-2). This is to say that the carport was *not* used as a passageway for entrance to the house itself. The Louisiana State Supreme Court erroneously held as a matter of fact that the side door was an entranceway into the house. In point of fact, this side door opened into a utility shed, and, as such, was not used, nor intended to be used by the members of the public.

Additionally, the evidence found on the exterior of the car was positioned so that it could not be seen by one merely walking to the front door of the house; rather, the evidence was on the right *front* of the vehicle and could only be seen by standing between the car and the rear of the carport. (Tr. p. 12, see def. exhibits D-3 and D-4). Clearly, if a lay person entered *any part* of the carport without permission, much less the area at the rear of the carport, possible charges of attempted burglary, criminal mischief, etc. would lie. Under these circumstances, there should be no question but that the protections of the Fourth Amendment to the United States Constitution applied to the car parked in the carport at 513 Norton Avenue. The next issue, therefore, is whether exigent circumstances existed so as to justify the officers' warrantless entrance into the constitutionally protected area.

In *Carroll v. United States*, 45 S.Ct. 280, 267 U.S. 132 (1925), this Honorable Court established a more relaxed warrant requirement for vehicles than for homes or buildings as the former, due to their mobility, can be quickly moved out of the jurisdiction or locality where the warrant is sought. The Court felt that if a police officer has probable or reasonable cause to believe that a vehicle contains contraband, he should not be required to obtain a search warrant if to do so would risk the loss of the evidence. This risk of loss, i.e., exigent circumstances, negates the need for a warrant.

However, the Court made it clear in *Coolidge v. New Hampshire*, 91 S.Ct. 2022, 403 U.S. 443 (1971), that the mere fact that an automobile is the object of a search does not mean that a search warrant will never be required. In *Coolidge*, the police had known for some time of the probable role of the car in the crime, and the defendant had had ample opportunity to destroy any evidence that might have been in the car. Furthermore, the defendant in *Coolidge* had no access to the vehicle at the time of his arrest, and the objects sought by the police were neither stolen, contraband, nor dangerous. The Court ruled that under those circumstances, the police were required to obtain a search warrant before searching the vehicle as no exigent circumstances existed that would negate the need for a warrant.

Factors to be considered regarding the existence of exigent circumstances are a suspect's access to the vehicle, the extent and practicality of policy observa-

tion of the car, and the length of time prior to the search in which the officers had to secure a warrant. See *Coolidge, supra*. An examination of the case at bar demonstrates that no exigent circumstances existed so as to justify a warrantless search.

When the police first arrived at 513 Norton, they observed that the car in the carport did *not* exactly fit the description given by the informant; that is, the informant had described the vehicle as being merely brown, whereas the car in the carport was brown and white. (MTS tr. pp. 7 and 24). As a result of this discrepancy, the police officers neither suspected the car's involvement in the offense nor knew that the car was in fact the one described by the informant. (MTS tr. pp. 8, 9 and 28). Moreover, *prior* to entering the premises, the officers observed that the vehicle had one flat tire and that no one was in the vicinity of the car. (MTS tr. pp. 7, 14, 26 and 17) When these facts are coupled with the fact that the police were not looking for contraband that could be easily hidden or destroyed (MTS tr. pp. 18 and 27), it becomes readily apparent that no exigent circumstances existed so as to negate the need for a warrant. This is to say that because the officers lacked probable cause to believe that the vehicle was the one involved in the crime, the vehicle could not be readily moved, and there was no imminent danger of the vehicle or evidence being tampered with or destroyed the police were under a constitutional obligation to obtain a search warrant. The defense submits that under the instant facts, this constitutional requirement would have

imposed absolutely no burden on the police as the premises could have easily been placed under surveillance while a warrant was obtained. The question then becomes whether the instant search was justified by the plain-view doctrine.

Under the plain-view doctrine, an officer can seize incriminating evidence which he observes in plain-view if he has a right to be where he is when he observes the evidence. But the Court has consistently held that in order for an officer to seize an object in plain-view, that object must be *clearly* contraband or evidence. Moreover, the jurisprudence is clear that planned warrantless searches can never be validated on plain-view grounds. *Coolidge v. New Hampshire,* 91 S.Ct. 2022; 403 U.S. 443 (1971).

When the officers in the instant case arrived at 513 Norton, they saw the vehicle in question parked in the carport but, as was previously stated, they did not believe this car to be the one referred to in the tip. (MTS tr. pp. 8, 9 and 28). In fact, it was not until *after* they had entered the carport and observed the front of the car that they suspected that it had been involved in a hit and run. Thus, *prior* to the officers' entering of the carport, the car was *not* clearly contraband, with the result that the officers did not have the right to enter the property and seize the car and evidence based only on their observations from the street. The final matter that needs to be discussed, therefore, is the possibility that the officers' search of the carport can be justified solely on the basis of the anonymous tip.

This Court has been called upon on many occasions to rule on searches made pursuant to information provided by either confidential or anonymous informants. See *Adams v. Williams,* 92 S.Ct. 1921, 407 U.S. 143 (1972); *Spinelli v. U.S.,* 89 S.Ct. 584, 393 U.S. 410 (1969); *Aguillar v. Texas,* 84 S.Ct. 1509, 378 U.S. 108 (1964); *Draper v. United States,* 79 S.Ct. 329, 358 U.S. 307 (1959). In each case, the central question was the degree of reliability of the information.

In *Adams, supra,* a police officer was told by a *reliable* informant that an individual seated in a nearby car was carrying narcotics and had a gun at his waist. When the officer approached the suspect, the individual acted suspiciously, so the officer reached for and found the hidden gun. In upholding the search and seizure, the Court stated:

> "(W)e believe that Sergeant Connolly acted justifiably in responding to the informant's tip. The informant was known to him personally and had provided him with information in the past. This is a stronger case than obtains in the case of an anonymous telephone tip. The informant here came forward personally to give information that was immediately verifiable at the scene." *Adams, supra.* S.Ct. 1923, U.S. 146.

In *Spinelli, supra,* the Court was faced with the question of the validity of a search warrant that was based

in large part on information provided by a "confidential" reliable informant. The affidavit in *Spinelli*, however, failed to specify why the informant had received his information. The Supreme Court, in reversing the conviction, noted that "in the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip described the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." *Spinelli, supra*, at S.Ct. 589, U.S. 416.

In *Draper, supra*, the Court upheld a search that was based on information that was supplied by an informant and that was verified by police observation. In *Draper*, a "special employee" of the Bureau of Narcotics had provided Agent Marsh with accurate and reliable information for about six months. He informed Marsh that one Draper would be arriving in Denver by train on a given date and that he would be carrying three ounces of heroin. He further gave Marsh a detailed physical description of Draper and the clothes he would be wearing and said that Draper habitually walked real fast. Upon placing the train station under surveillance, the police observed an individual fitting the exact description and having all of the physical characteristics of the suspect described by the informant. Accordingly, the police stopped and arrested Draper. In upholding the arrest, the Supreme Court found particularly persuasive the facts that the informant had been reliable in the past and that the information leading up to the arrest was verified by the police.

It should be clear that in the case now before this Court, the officers had absolutely no reason to believe that the information was reliable, and they made no attempt to verify the tip *prior* to conducting the search. As was previously stated, the information that lead the police to 513 Norton was provided by an *anonymous* informant, with the result that the officers did not know whether or not the informant had ever provided information, reliable or unreliable, in the past. Moreover, the information provided, that is, that a brown Ford was parked in the carport at 513 Norton, was not entirely correct as the car was in fact brown and white. This discrepancy confused the officers as to whether the car was the one referred to in the tip. (MTS tr. pp. 8 and 28). Finally, the tip did not specify what the hit and run vehicle had allegedly been involved in and did not indicate how the informant had come upon the information. (MTS tr. pp. 5, 17 and 24). Thus, under the principle enunciated by the Court, the instant tip did not constitute sufficient probable cause to justify a search of the premises at 513 Norton.

The petitioner submits that for the reasons discussed above, the search and seizure now before this Honorable Court violated the defendant-appellant's rights under the Constitution of the United States to be free from unreasonable searches. As such, all

evidence obtained as a result of the seizure must be excluded at trial. *Mapp v. Ohio*, 81 S.Ct. 1684, 367 U.S. 643 (1961). Because the vehicle and evidence here in question served to link the defendant to the crime charged, the Trial Court's error in denying the Motion to Suppress Evidence can in no conceivable way be deemed harmless. For these reasons, the petitioner respectfully urges this Honorable Court to issue a Writ of Certiorari to the Louisiana State Supreme Court reversing his conviction and/or suppressing any and all evidence obtained from the instant search.

2.) The seizure of the petitioner's automobile violated the 4th Amendment of the United States Constitution.

Several hours after the St. Bernard police officers first saw the petitioner's automobile in the carport, the vehicle was seized by New Orleans officers and removed to the New Orleans police laboratory, still without the officers having obtained a warrant and/or judicial authority to do so. This warrantless seizure, according to the Louisiana State Supreme Court, was justified by exigent circumstances. These circumstances consist of a hurricane alert at the time, instanced by overcast skies, and the testimony of the officer in charge that, should the hurricane strike, the evidence on the exterior of the automobile might be damaged or obliterated by the rain, even though covered by plastic and even though the vehicle was in a carport.

The most obvious fallacy with this reasoning is that the New Orleans police officers had several hours *before* the questioned seizure to obtain a search warrant. Certainly, the "exigent circumstances" existed during this period of time, yet, the officers failed to obtain the requisite warrant. See *Taylor v. U.S.*, 286 U.S. 1, 76 L.Ed. 951, 52 S.Ct. 466 and *Coolidge v. U.S., supra.*

More important, the imminent hurricane, relied on to complete the "exigent circumstances," should have convinced the prudent police to keep the car in the protection of the carport and obtain a warrant for its seizure. (See Justice Dixon's dissentiry opinion, *State v. Wilbourn, supra,* et 997.)

The petitioner submits that the warrantless seizure herein was unjustifiable and illegal. The police claim that it was necessary to seize the automobile from an enclosed, protected area and move it into the very face of the impending storm is both illogical and unreasonable. The explanation for the seizure and the seizure itself violates petitioner's Fourth Amendment right to be secure against unreasonable search and seizures.

3.) The New Orleans police lacked jurisdiction and/or legal right to search and seize the petitioner's automobile.

The petitioner's automobile, when first sighted by law enforcement officials, was parked in Arabi, Loui-

siana, St. Bernard Parish. After the initial search of the vehicle by St. Bernard Parish officials, the petitioner's automobile was seized by New Orleans Police Officers, and transported over parish lines without judicial warrant and/or legal authority. In the New Orleans Police Department Crime Laboratory the exterior of the car was scientifically examined. Petitioner respectfully submits that the results of these scientific examinations were illegally obtained and should be suppressed, as the New Orleans Police Department had no authority to seize the car and transport it across parish (i.e. county) lines.

The automobile in question was clearly outside of the jurisdiction of the New Orleans Police. It was parked in St. Bernard Parish. There is no question of "hot pursuit."

The New Orleans Police have no jurisdiction in St. Bernard Parish nor do the St. Bernard Parish police have any authority to release an automobile parked in St. Bernard Parish and belonging to a St. Bernard Parish citizen, to the police from another authority without judicial authority.

4.) The jury selection process violated the due process and equal protection clauses of the 6th and the 14th Amendments of the United States Constitution.

The Louisiana Code of Criminal Procedure Article 784, entitled "Method of Selecting Panel", provides:

> "In selection a panel, names *shall* be drawn from the petit jury venire indiscriminately and by lot in open court and in a manner to be determined by the court." (emphasis added)

There is no doubt that the trial court in this case failed to select the petit jurors by lot in open court as required by La. Code of Criminal Procedure Article 784. Instead, the order of calling the petit jurors venire had allegedly been determined by lot, but this was in the jury pool room instead of in open court.

The Louisiana State Supreme Court, in *State v. Hoffman*, 345 So.2d 1 (LA. 1977) held that while this procedure was invalid it would only apply this ruling to jury panels selected after the finality of the decision of the court in *Hoffman*. (See *State v. Wilbourn, supra*, at 997).

The petitioner respectfully submits that this prospective application of La. Code of Criminal Procedure Article 784, violates the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. A chronological sequence of the two cases, i.e. *Hoffman* and *Wilbourn*, demonstrates the violation.

The instant case was tried, and timely objection was made, to the petit juror venire by the petitioner, on March 31, 1977. Petitioner's written motion for appeal was filed on April 7, 1977. The final decision in *Hoffmann* was handed down on April 26, 1977. Petitioner submits

that, at the very least, his motion for appeal was submitted to the Louisiana Supreme Court before its decision in *Hoffmann*. (See *State v. Gibbs*, 355 So.2d 1299 at 1302 (La. 1978). Accordingly, his case is one in which the application of the law should be made.

Most importantly, the Louisiana State Supreme Court in *Hoffmann* found that the trial court's failure to select a jury panel as mandated by Louisiana Code of Criminal Procedure, Article 784 was a serious defect and constituted reversible error.

The same considerations that prompted the State Supreme Court to make such a ruling apply to the instant case with equal force. Further, while the instant case preceded the *Hoffmann* decision by only one month, it is nevertheless entirely possible that this brief could have been timely submitted for appellate review had there been no delays on the part of the trial court reporter of Section "I" of the Criminal District Court for the Parish of Orleans, in transcribing the trial and hearings and if counsel had realized that time was of the essence for filing the brief. Accordingly, to limit the application of *Hoffman* so as to exclude those cases in which a motion for appeal had been filed *prior to Hoffman and* in which timely objection to the jury selection had been made at the trial, would be to violate all Notions of fundamental fairness and due process of law.

The petitioner submits that he was denied his rights to due process of law and a fair trial when the jury for his trial was selected in violation of C.Cr. P. Article 784.

Moreover, petitioner submits that he was denied equal protection of the laws when the application of the Louisiana State Supreme Court's decision which would reverse his conviction is applied prospectively only. Petitioner had filed his motion weeks before such a decision. The error in his case was just as defective as the error in the *Hoffman* case. For this reason, petitioner respectfully urges this Honorable Court to issue a writ of certiorari to the Supreme Court of the State of Louisiana.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Louisiana Supreme Court in *State v. Wilbourn*, reported in proceedings No. 62,005 of the Supreme Court of Louisiana.

Respectfully submitted,

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CERTIFICATE

I hereby certify that three copies of the above and foregoing have been served on Hon. Harry Connick, District Attorney and Dennis Waldron, Criminal Courts Building, 2700 Tulane Avenue, New Orleans, Louisiana 70119, by U.S. Mail, postage prepaid, this ____ day of March, 1979.

BRUCE C. ASHLEY, II

APPENDIX

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA,
Appellee

versus No. 62,005

HUGH C. WILBOURN,
Appellant.

Dated: Nov. 13, 1978

Appeal from the Criminal District Court, Orleans Parish; Honorable Israel M. Augustine, Jr., District Judge, Presiding.

TATE, Justice.

The defendant was convicted of three counts of negligent homicide, La. R.S. 14:32, and sentenced to five years imprisonment on each count, the sentences to run concurrently. The defendant's appeal relies upon two assignments of error.

Assignment of Error No. 1 presents a substantial issue. It concerns the denial of a motion to suppress certain evidence obtained as the result of a warrantless and allegedly unconstitutional search and seizure.

Context Facts

The accused is charged with the deaths of three persons injured by a hit and run motorist on September 21. On the following day at about 4:15 p.m., the police received an anonymous telephone tip that a brown Ford believed to be involved in a hit and run accident on Paris Road was located in a carport in the vicinity of Norton Street at Paris Road.

The dispatcher radioed to two police officers who were cruising in the vicinity. They saw a brown Ford with a white top parked in a carport at 513 Norton Street. Only the rear of the car was fully visible from the street.

The officers entered the carport to look at the car. When they came to its front, they saw blood and particles of hair on the right font. They radioed their findings, and other officers came and took pictures, then taped a covering on the front of the vehicle.

The automobile belonged to the defendant, who was a tenant at 513 Norton Street. Subsequently, the owner of the premises came home and identified the accused as the vehicle's owner. Neither the accused nor the home owner authorized the search of the vehicle, nor its subsequent impounding (when it was removed to a police laboratory).

The police officer's entry in the carport to look at the front of the vehicle was admittedly made without a

warrant, as was the subsequent removal of the vehicle to the police laboratory.

Legal Issue

The ultimate issue is whether the police officers' entry into the carport to look at the vehicle violated any reasonable expectation of privacy on the accused's part that is constitutionally protected. State v. Lamartiniere, ____ So.2d ____ (docket no. 61,621); State v. Fearn, 345 So.2d 468 (La. 1977); State v. Nine, 315 So.2d 667 (La. 1975). These decisions indicate that the test is not only whether the person had an actual (subjective) expectation of privacy, but also whether the defendant's expectation of privacy is of a type which society at large is prepared to recognize as being reasonable.

Our resolution of this issue is not free from doubt. Under some circumstances, and with the physical layout of some carports, the individual's reasonable expectation of privacy might be violated by an unauthorized entry into a carport to look at its contents.

However, it is a particular individual's right to privacy, not a particular place, which is protected by the constitution. Thus, it is appropriate to take into consideration the particular facts and circumstances, the total atmosphere of the case, in determining whether the constitutional right to privacy has been violated by an unauthorized entry into a part of the premises

which is open to the public. State v. Nine, cited above, at 315 So.2d 671.

Under the particular circumstances of this case, we do not find that either the accused's subjective expectation of privacy, or else what society would consider a reasonable expectation of privacy, were offended by the police officers' entry into the unenclosed carport to look at the front of the vehicle, which had been reported (although by a tip of unverified reliability) as having been involved in a hit and run accident the day before. The carport was on the side of the house, not enclosed from the street, and only partially enclosed on one side:

Persons entering the side-door of the house, or those knocking at the side-door to find out if someone was home or to deliver or sell something, could readily view the front of the vehicle parked alongside. That sort of entry into this carport by members of the public (including police officers on an investigatory mission) is deemed to have been reasonably within the contemplation of the accused, when he left property in the semi-public premise available for public view.

We therefore find no unconstitutional invasion of the accused's right to privacy resulted when the police officers entered this particular carport to look at the vehicle, and no unconstitutional taint in their recording the information they observed there.

Nevertheless, a further troublesome issue is raised by the accused. A couple of hours after the first visit,

the vehicle was seized by officers and removed to the police laboratory, still without the officers having obtained a warrant and judicial authority to do so. The accused contends, with considerable force, that, at least, the results of the laboratory testing consequent to this warrantless seizure should be suppressed.

The laboratory testing was limited to findings based on an examination of the exterior of the vehicle. Cf. Cardwell v. Lewis, 417 U.S. 583, 94 S.Ct. 2464 (1978). We are not faced with a warrantless search of the interior or trunk of the car, following a warrantless seizure. If we were, our conclusion might well be different than the following:

With some reservations, we finally conclude that the trial court did not err in finding that the warrantless seizure was justified by exigent circumstances, insofar as it was immediately necessary to protect evidence on the vehicle's exterior. The circumstances consist of the hurricane alert at the time, instanced by overcast skies, and the testimony of the officer in charge of the substantial possibility that, should the hurricane strike, the evidence of blood and hairs on the automobile might be damaged or obliterated by rain, even though covered by plastic and even though the vehicle was in a carport (which, however, was open at the side and to its rear).

Conclusion .

The other assignment of error concerns the failure to select the petit jurors by lot in open court as required by La.C.Cr.P. art. 784. See State v. Hoffman, 345 So.2d 1 (La. 1977). Here, the order of calling the petit juror venire had indeed been determined by lot, but in the jury pool room instead of in open court.

The present case was tried before *Hoffman* had held to be invalid the latter procedure utilized by the Criminal District Court of Orleans Parish. However, *Hoffman* specifically limited the effect of its ruling to jury panels selected after the finality of the decision of the court in that case.

Accordingly, for the reasons assigned, we affirm the convictions and sentences.

AFFIRMED.

/s/ FAB
/s/ FWS
/s/ AT, Jr.
/s/ PFC
/s/ WFM
/s/ JLD

DIXON J., dissents with reasons.

SUPREME COURT OF LOUISIANA

No. 62005

STATE OF LOUISIANA

versus

HUGH C. WILBOURN

DIXON, Justice (dissenting)

I respectfully dissent.

True, there was no expectation of privacy, and the initial intrusion into the carport was not illegal. But no adequate reason is suggested to justify the failure of the police to obtain a warrant for the seizure of the car. The imminent hurricane, relied on to complete the "exigent circumstances," should have convinced prudent police to keep the car in the protection of the carport and obtain a warrant for its seizure.

SUPREME COURT OF LOUISIANA

NO. 62005

STATE OF LOUISIANA

VERSUS

HUGH C. WILBOURN

APPEAL FROM THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, STATE OF LOUISIANA, SECTION "I", NO. 253-070, THE HONORABLE ISRAEL M. AUGUSTINE, JR., JUDGE PRESIDING

APPLICATION FOR RE-HEARING
ON BEHALF OF HUGH C. WILBOURN,
DEFENDANT-APPELLANT

Submitted By:

EDWARD S. BOPP
A LAW CORPORATION
Suite 102 - 6725 St. Claude Avenue
Arabi, Louisiana 70032
/s/ BRUCE C. ASHLEY, II
Bruce C. Ashley, II
Attorney for Hugh C. Wilbourn

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[1] *STATEMENT OF JURISDICTION*

The defendant-appellant, Hugh C. Wilbourn, was charged with and convicted of three (3) counts of violating L.R.S. 14:32, relative to the offense of negligent homicide. He was sentenced to serve five (5) years in the custody of the Louisiana Department of Corrections, with credit for time served, on each of the three (3) counts, the sentences to run concurrently. On November 13, 1978, this Honorable Court affirmed the defendant's conviction. This Honorable Court has appellate jurisdiction over this cause by virtue of Rule 9 of the Louisiana Supreme Court Rules.

STATEMENT OF THE CASE

On September 21, 1975, three men were killed in an alleged hit-and-run incident on the Bayou Bienvenue Bridge. The defendant-appellant, Hugh C. Wilbourn, was arrested and charged with the offenses.

On January 13, 1976, the Orleans Parish Grand Jury returned a true bill of indictment charging the defendant-appellant with three counts of negligent homicide. Trial was held on March 31, 1977, at which time, the defendant was found to be guilty as charged on all three counts.

On April 5, 1977, the defendant filed a Motion for New Trial which was denied, and was sentenced to serve five years in the custody of the Department of Corrections on each count, with credit for time served. The sentences were to run concurrently.

Of the objections noted at trial, only two have been assigned as error for the purposes of appellate review. The first error deals with the Trial Court's denial of counsel's Motion to Suppress Evidence following the hearing held on such Motion on January 4, 1977. Defense counsel applied for remedial writs attacking the denial of the Motion to Suppress, but said application was denied. The second error now submitted for review concerns the jury selection procedure used at trial.

This matter came before this Honorable Court on October 12, 1978 for oral argument. On November 13, 1978, this Court, in an opinion authored by Justice Tate, affirmed defendant's conviction by a vote of six to one, with a singular dissent by Justice Dixon.

[2] *SYLLABUS*

A search conducted without a warrant issued upon probable cause is per se unreasonable subject only to a few specifically established and well delineated exceptions.

SPECIFICATION OF ERROR

The trial court erred when it denied defense counsel's Motion to Suppress Evidence.

ARGUMENT

In this Honorable Court's original decision, it made the factual determination that the protection afforded by the Fourth Amendment to the United States Constitution did not apply in this particular case.

This Honorable Court based its findings on the following findings of fact:

1) ". . . the carport was on the side of the house, not enclosed from the street, and only partially enclosed on one side." (Supreme Court Opinion p. 3; App. p 4a)

2) "Persons entering the side-door of the house, or those knocking at the side-door to find out if someone was home or to deliver or sell something, could readily view the front of the vehicle parked alongside. That sort of entry into this carport by members of the public (including police officers on an investigatory mission) is deemed to have been reasonably within the contemplation of the accused, when he left property in the semi-public premise available for public view." (Supreme Court Opinion p 3; App. p 4a)

The defendant respectfully avers that this Honorable Court misconstrued the physical lay-out of the carport in question for the following reasons:

1) The "side-door" was actually in front of the automobile, recessed at the farthest point of the carport.

2) The door was not an entranceway into the house, but only into the utility shed, and as such, was not used by members of the public.

[3] *CONCLUSION*

The defendant respectfully requests that this Honorable Court reconsider its opinion of November 13, 1978 in which it affirmed defendant's conviction because it made an erroneous finding of fact relative to the "side-door" and the defendant's expectation of privacy within the area in question.

[4] *CERTIFICATION*

I hereby certify that the foregoing Application for Re-Hearing on behalf of Defendant-Appellant has been duly served on Appellee by placing two copies of same in the United States mail, postage prepaid, properly addressed to Mr. Dennis Waldron, Assistant District Attorney, Criminal Courts Building, 2700 Tulane Avenue, New Orleans, Louisiana, 70119.

Arabi, Louisiana, this 27th day of November, 1978.

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Supreme Court, U. S.
FILED
MAY 30 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1402

HUGH C. WILBOURN,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF LOUISIANA

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF LOUISIANA

STATEMENT OF FACTS

On Sunday morning, September 21, 1975, three men were struck and killed by a "hit and run" automobile while fishing along Paris Road in Orleans Parish.

Through their investigation, officers learned the vehicle was a late model, dark in color, automobile. The

vehicle was being driven in the direction of St. Bernard Parish, a suburb of New Orleans, at the time of the incident.

The next day, Monday, September 22, 1975, two St. Bernard Parish deputies received a radio call to check a vehicle parked in the driveway of 513 Norton Avenue, Arabi, Louisiana.

The radio call was the result of an anonymous telephone call to the St. Bernard Sheriff's Office. The substance of the call was that "the car that killed the men on the bridge yesterday is at 513 Norton Drive".

Upon their arrival, the deputies noted a car to be parked in the open-ended carport of the house. They knocked at the front door of the house, but received no response.

No one likewise responded when they knocked on the side door adjacent to the carport, where the vehicle was parked.

The Officers noted the car in question to be a white/over/brown 1974 Ford, license plate number 51B921. It matched the description of the vehicle involved in the fatal accident.

An examination of the front of the vehicle revealed the fenders, grille and hood to be damaged; as well as covered with what then appeared to be bloodstains and human flesh matter.

Portions of decorative grille work, that appeared to have been removed from the grille of the vehicle, were observed in plain view in an open trash can on the side of the house.

Because the officers suspected the vehicle to have been involved in the "hit-and-run" incident, it was determined that the car should be photographed and specimens taken from the exterior of the vehicle to substantiate the officers suspicions as to human blood and human flesh.

The U.S. Weather Service had declared a "hurricane watch" for the evening of September 22, 1975. The weather conditions were cloudy and rain had been forecast.

Fearing that the stains and flesh matter might be washed away if the predicted rain began to fall; and further realizing that the automobile might be driven away if the officers departed the scene; it was decided the vehicle should be impounded. The time was approximately 6:00 p.m.

A tow wagon arrived shortly thereafter and the vehicle was removed to the New Orleans Police Department Garage. Precaution was taken to have the hood area of the vehicle covered with a plastic covering; to avoid any problem should the rain begin to fall during the towing process.

The grille work that had been observed in the trash can was also seized.

Police technicians later removed scrapings from the hood area of the vehicle and found them to be human blood and flesh. The recovered grille work was matched to the vehicle's damaged drille.

At no time was the car's interior or trunk searched. Photographs of the vehicle were taken and the vehicle was later released by the police.

REASONS FOR DENYING THE WRIT

1. Search And Seizure Of Vehicle

Petitioner contends the warrantless search and seizure of said vehicle violates the U.S. and Louisiana guarantees against unreasonable searches and seizures.

Respondent submits that under both federal and state jurisprudence there is no basis for such contention by defendant.

The police received an anonymous telephone call concerning the presence of the vehicle at the Norton Street address. They immediately proceeded to that address to investigate. *Upon their arrival, they could not help but see the vehicle in plain view in the driveway of the house.*

Petitioner contends the officer's visit to the house was an unwarranted invasion upon the privacy rights of the citizens residing at that address. Such is not the case.

The officer's actions stemmed from an anonymous telephone call. They did not set out to arrest anyone and/or seize anything. Their function was merely of an investigatory nature. They had only had a right to proceed to the scene; but they would have been derelict in their duty had they not investigated.

It is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes, if such inquiries are courteously made and not accompanied with any assertion of a right to enter or search or secure answers. *SCHNECKLOTH v. BUSTAMONTE*, 93 S.Ct. 2041; *STATE v. TORNABENE*, 337 So.2d 214 (La. 1976).

Here the officers set out to investigate and attempt to question the occupants of the house. Upon their arrival, *they found no one to speak with. However, in "plain view" they observed the vehicle in question.* The officers *did not attempt to search the interior or trunk* of the car for incriminating evidence. There was no need to do so because the vehicle itself was the "instrumentality of the crime".

This evidence, along with the pieces of grille in the trash can, was in "plain view". The vehicle was clearly visible from the public street and *no real search of it was ever conducted.* The officers' examination was limited exclusively to the exterior of the vehicle.

In *CARDWELL v. LEWIS*, 94 S.Ct. 2464, *this Honorable Court held that a warrantless "search" of a vehicle was constitutional when said "search" was limited to the removal of paint*

scrapings from the vehicle's exterior and the examination of one of the vehicle's tires.

In *CARDWELL*, the defendant was arrested for murder. Incidental to that arrest, his automobile keys and a parking lot stub were removed from his pocket. The police then sent a tow wagon to the parking lot and had the car impounded at the police garage. It should be noted that defendant was arrested at police headquarters, several blocks from the parking lot.

The next day, a police technician removed exterior paint samples from the vehicle and examined one of the vehicle's tires. It was determined that the tire matched tire casts made at the murder scene and the paint scrapings were matched to the victim's car. (The victim's car had been pushed over a cliff by another vehicle).

The following is pertinent language from *CARDWELL*:

> *This case is factually different from prior car search cases decided by this Court. The evidence with which we are concerned is not the product of a "search" that implicates traditional considerations of the owner's privacy interest. It consisted of paint scrapings from the exterior and an observation of the tread of a tire on an operative wheel. The issue, therefore, is whether the examination of an automobile's exterior upon probable cause invades a right to privacy which the interposition of a warrant re-*

quirement is meant to protect. This is an issue this Court has not previously addressed. (Emphasis Added)

At least since *CARROL v. UNITED STATES*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925); *the Court has recognized a distinction between the warrantless search and seizure of automobiles or other movable vehicles, on the one hand, and the search of a home or office, on the other.* Generally, less stringent warrant requirements have been applied to vehicles. In *CHAMBERS v. MARONEY*, 399 U.S. 42, 49, 90 S.Ct. 1975, 1980, 26 L.Ed. 2d 419 (1970), the Court chronicled the development of car searches and seizures. An underlying factor in the Carrol Chambers line of decisions has been the exigent circumstances that exist in connection with movable vehicles. "[T]he circumstances that furnish probable cause to search a particular auto for particular articles are most often unforeseeable; moreover, the opportunity to search is fleeting since a car is readily movable". *CHAMBERS v. MARONEY*, 399 U.S., at 50-51, 90 S.Ct., at 1981. This is strikingly true where the automobile's owner is alerted to police intentions and, as a consequence, the motivation to remove evidence from official grasp is heightened.

There is still another distinguishing factor. *"The search of an automobile is far less intrusive on the*

rights protected by the Fourth Amendment than the search of one's person or of a building". ALMEILA [sic]-*SANCHEZ v. UNITED STATES,* 413 U.S. 266, 279, 93 S.Ct. 2535, 2542, 37 L.Ed.2d 596 (1973) (Powell, J., concurring). *One has a lesser expectation of privacy in a motor vehicle* because its function is transportation and it seldom serves as one's residence or as the respository of personal effects. *A car has little capacity for escaping public scrutiny.* It travels public thoroughfares where its occupants and its contents are in plain view. See *PEOPLE v. CASE,* 200 Mich. 379, 388-389, 190 N.W. 289, 292 (1922). *"What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection". KATZ v. UNITED STATES,* 389 U.S., at 351, 88 S.Ct., at 511; *UNITED STATES v. DIONISIO,* 410 U.S., at 14, 93 S.Ct., at 771. This is not to say that no part of the interior of an automobile has Fourth Amendment protection; the exercise of a desire to be mobile does not of course, waive one's right to be free of unreasonable government intrusion. But insofar as Fourth Amendment protection extends to a motor vehicle, it is the right to privacy that is the touchstone of our inquiry. (Emphasis Added)

In the present case, nothing from the interior of the car and no personal effects, which the Fourth Amendment traditionally has been deemed to protect, were searched or

seized and introduced in evidence. With the "search" limited to the examination of the tire on the wheel and the taking of paint scrapings from the exterior of the vehicle left in the public parking lot, *we fail to comprehend what expectation of privacy was infringed. Stated simply, the invasion of privacy, "if it can be said to exist, is abstract and theoretical". Air Pollution Variance Board v. Western Alfalfa Corp.,* 416 U.S. 861, 865, 94 S.Ct. 2114, 2116, 40 L.Ed.2d (1974). Under circumstances such as these, where probable cause exist, a warrantless examination of the exterior of a car is not unreasonable under the Fourth and Fourteenth Amendments. (Emphasis Added)

Here, it has been established and is conceded that the police had probable cause to search Lewis' car. An automobile similar in color and model to his car had been seen leaving the scene of the crime. This similarity was corroborated by comparison of the paint scrapings taken from the victim's car with the color and paint of Lewis' automobile. Lewis had had repair work done on his car immediately following the death of the victim. And he had a nexus with Radcliffe on the day of his death. All this provided reason to believe that the car was used in the commission of the crime for which Lewis was arrested. *COOPER v. CALIFORNIA,* 386 U.S. 58, 61, 87 S.Ct. 788, 790, 17 L.Ed.2d 730 (1967). (Emphasis Added)

Concluding, as we have, that the examination of the exterior of the vehicle upon probable cause was reasonable, we have yet to determine whether the prior impoundment of the automobile rendered that examination a violation of the Fourth and Fourteenth Amendments. We do not think that, because the police impounded the car prior to the examination, which they could have made on the spot, there is a constitutional barrier to the use of the evidence obtained thereby. Under the circumstances of this case, the seizure itself was not unreasonable. (Emphasis Added)

Respondent contends that here, unlike *CHAMBERS*, probable cause to search the car existed for some time prior to arrest and that, therefore, there were no exigent circumstances. Assuming that probable cause previously existed, we know of no case or principle that suggests that the right to search on probable cause and the reasonableness of seizing a car under exigent circumstances are foreclosed if a warrant was not obtained at the first practicable moment. Exigent circumstances with regard to vehicles are not limited to situations where probable cause is unforeseeable and arises only at the time of arrest. Cf. *CHAMBERS*, id., at 50-51, 90 S.Ct., at 1980-1981. The exigency may arise at any time, and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation's necessitating prompt police action.

In the instant case, the officers had a right to go to the Norton Street address. See *TORNABENE*, supra.

They brought no warrants to search or arrest simply because they had no idea of whom and/or what they would discover upon their arrival.

They discovered what they believed to be the vehicle involved in the fatal hit and run accident.

The vehicle they observed matched the description of the hit and run vehicle provided by witnesses to the accident.

The condition of the grille work and the discarded pieces of plastic grille that were abandoned in a garbage can; in addition to the presence of human blood and flesh matter on the front exterior of the car, only added to the reasonable belief that this was in fact the vehicle that had struck and killed three persons a day earlier.

Additionally, the officers were aware of the telephone caller's report that this was the vehicle involved in the accident; as well as the fact that the vehicle was located the day after the accident, in St. Bernard Parish, the direction in which the vehicle was traveling at the time of the accident.

Probable cause clearly existed for the officers to search the car.

Likewise, there were exigent circumstances existing at the time the officers observed the vehicle.

The impending weather conditions justified a belief that if the vehicle remained on the carport the rains would wash away the blood and human flesh matter contained on the exterior of the car. As one officer testified during the motion to suppress hearing, "it appeared as if the heavens were going to open".

The officers' decision to immediately impound the vehicle was based also on the official National Weather Service "hurricane watch" that was in effect at the time. Evidence that they acted in good faith was the fact that they went to great length to cover the hood and front portion of the vehicle's exterior so as to prevent any problems should the precipitation have begun while the vehicle was enroute to the police garage.

The existence of probable cause coupled with exigent circumstances is one of the well delineated exceptions to the warrant requirement of the Fourth Amendment. *STATE v. LAIN*, 347 So.2d 167 (La. 1977); *STATE v. HEARN*, 340 So.2d 1365 (La. 1976).

> *In LAIN, it was pointed out that if there is a reasonable basis for moving a vehicle from the place where it was initially stopped, and at the time of the stop the police had the legal right to search where the police eventually searched, and a relatively short time elapses between the decision to move the vehicle to a safer location and the ultimate search, then the search is constitutional;*

citing *CHAMBERS v. MARONEY*, 90 S.Ct. 1975, 1981 (1970) and *STATE v. THOMAS*, 310 So.2d 517 (La. 1975).

The language is *LAIN* is similar to that of this Honorable Court in *CARDWELL v. LEWIS*, supra, concerning what effect, if any, a decision by the police to move a vehicle from the place where it is parked has on their right to conduct a warrantless search of the vehicle after it has been moved. In *CARDWELL*, there was probable cause to conduct a limited "search" of the exterior of the vehicle at the parking lot where it was first located. That limited right to search "accompanied" the vehicle as it was towed away and "was still present" when the vehicle arrived at the police garage.

That exact fact situation is present in the instant case.

There clearly was a prior justification for the officers going to the defendant's home. They had a duty to investigate the possibility that a vehicle, and perhaps its driver, responsible for the deaths of three men the day before, could be found at 513 Norton Avenue. *SCHECKLOTH; TORNABENE*, supra.

They unsuccessfully attempted to ascertain if anyone was inside the house, by knocking first at the front door and then at the door on the side of the carport. It was at this point that they noticed the condition of the hood and grille area of the vehicle, as well as the pieces of grille that had been abandoned in the open garbage can.

The police officers initial effort to speak to someone in the house was perfectly legal.

Although a police officer may not arrest upon mere suspicion, HENRY v. UNITED STATES, 361 U.S. 98 (1959), *or for "investigation", BENNETT v. UNITED STATES,* 104 F.2d 209 (D.C. Cir. 1939), *he has a duty to approach, LEE v. UNITED STATES,* 221 F.2d 29 (D.C. Cir. 1974), *confront and interrogate (which may include the power to temporarily detain). It is the most useful, most efficient, and most effective method of investigation. Often it develops probable cause, KEININGHAM v. UNITED STATES,* 307 F.2d 632 (D.C. Cir. 1962), as to the warrantless seizure of the vehicle itself.

Additionally, special emphasis must be placed on the limited seizure of evidence from the exterior of the car. As in CARDWELL, supra, this evidence was not the product of a "search" that implicates traditional considerations of the owner's privacy interest. (Emphasis Added)

Neither the initial intrusion onto petitioner's property nor the subsequent seizure and limited search of the vehicle violated any reasonable expectation of privacy on petitioner's part that is constitutionally protected.

As the Louisiana Supreme Court noted in affirming petitioner's conviction:

> However, it is a particular individual's right to privacy, not a particular place, which is protected by the constitution. Thus, it is appropriate to take into consideration the particular facts and circumstances, the total atmosphere of the case, in determining whether the constitutional right to privacy has been violated by an unauthorized entry into a part of the premises which is open to the public. *STATE v. NINE,* cited above, 315 So.2d 671.
>
> Under the particular circumstances of this case, we do not find that either the accused's subjective expectation of privacy, or else what society would consider a reasonable expectation of privacy, were offended by the police officers' entry into the unenclosed carport to look at the front of the vehicle, which had been reported (although by a tip of unverified reliability) as having been involved in a hit and run accident the day before. The carport was

on the side of the house, not enclosed from the street, and only partially enclosed on one side.

Persons entering the side-door of the house, or those knocking at the side-door to find out if someone was home or to deliver or sell something, could readily view the front of the vehicle parked alongside. That sort of entry into this carport by members of the public (including police officers on an investigatory mission) is deemed to have been reasonably within the contemplation of the accused, when he left property in the semi-public premise available for public view.

We therefore find no unconstitutional invasion of the accused's right to privacy resulted when the police officers entered this particular carport to look at the vehicle, and no unconstitutional taint in their recording the information they observed there.

Nevertheless, a further troublesome issue is raised by the accused. A couple hours after the first visit, the vehicle was seized by officers and removed to the police laboratory, still without the officers having obtained a warrant and judicial authority to do so. The accused contends, with considerable force, that, at least, the results of the laboratory testing consequent to this warrantless seizure should be suppressed.

> The laboratory testing was limited to findings based on the examination of the exterior of the vehicle. Cf. *CARDWELL* v. *LEWIS*, 417 U.S. 588, 94 S.Ct. 2464 (1978). We are not faced with a warrantless search of the interior or trunk of the car, following a warrantless seizure. If we were, our conclusion might well be different . . . . 356 So.2d 995, at p. 996.

2. The Jury Selection Process

In *STATE v. HOFFMAN*, 345 So.2d 1 (La. 1977), the Louisiana Supreme Court refused to apply retroactively its ruling concerning the invalidity of the method of selecting jury panels in the Orleans Parish Criminal District Court.

The Court determined that "the interests of the administration of justice would best be served by giving this decision prospective application only to those cases wherein a jury panel is selected after this opinion becomes final except those cases which have already been submitted — for decision".

The determinative factor in giving retroactive application to a new rule of law is whether the rule goes to the integrity of the fact-finding process. *WILLIAMS v. UNITED STATES*, 91 S.Ct. 1148 (1971).

Here the Louisiana Supreme Court correctly determined that the *"HOFFMAN* rule" did not go to the integrity of the fact-finding process and refused to apply it retroactively.

CONCLUSION

For these reasons, the petition for a Writ of Certiorari should be denied by this Honorable Court.

Respectfully Submitted,

Dennis J. Waldron
Assistant District Attorney
Orleans Parish
State of Louisiana

CERTIFICATE

I hereby certify that three copies of the above and foregoing have been served on Bruce C. Ashley, II, Esq., 6725 St. Claude Avenue, Suite 102, Arabi, LA 70032, by U.S. Mail, postage prepaid, this ____ day of May, 1979.

Dennis J. Waldron

Supreme Court, U. S.
FILED
JUL 27 1979
MICHAEL RODAK, JR., CLERK

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF LOUISIANA

The petitioner, HUGH C. WILBOURN, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Louisiana entered in this proceeding on November 13, 1978.

STATUS OF THE CASE

On March 13, 1979, HUGH C. WILBOURN, petitioner herein, filed a petition with this Honorable

Court for a Writ of Certiorari to the Supreme Court for the State of Louisiana. After reviewing this petition, this Court requested and received a Brief in Opposition to said Writ from the State of Louisiana. Petitioner now respectfully submits this Reply Brief. Petitioner re-urges and re-emphasizes all four of its original reasons for granting of said Writ, believing all of them to be meritorious. This Reply Brief specifically addresses itself to petitioner's first reasons for granting the Writ, i.e., the search conducted herein violated the Fourth Amendment of the United States Constitution, because petitioner believes that respondent's argument on this issue is particularly in error both factually and legally.

I.

The search conducted herein violated the Fourth Amendment of the United States Constitution.

On Monday, September 22, 1975, at about 4:15 P.M., St. Bernard Parish Deputies, B. Emmons and L. Gagliano were on routine vehicular patrol when they received a radio dispatcher to proceed to 513 Norton Avenue, Arabi, Louisiana, and check for a brown late model Ford suspected of being involved in a hit-and-run. The source of this information was an anonymous telephone call received by the radio dispatcher.

At approximately 4:30 P.M., Deputies Emmons and Gagliano arrived by vehicle and stopped at the premises located at 513 Norton Avenue. Upon arriving, the

officers observed a two-tone (white top, brown bottom) 1974 Ford parked under the carport. The right rear tire of the vehicle in the carport was flat, and its right rear bumper appeared to be damaged. The car was parked with its rear facing Norton Avenue (See defense Exhibits D-3 and D-4). The car and carport appeared to be empty.

The officers then entered the carport in order to obtain view of the front of the vehicle in an effort to determine if the vehicle had in fact been involved in a hit-and-run. Once in the carport, the officers walked to the front of the vehicle and observed what appeared to be blood stains and damage on the front of the car. The front of the vehicle could not be seen from either the street or sidewalk.

Thereafter, the vehicle was impounded, without a search warrant, determined to be owned by defendant, HUGH C. WILBOURN. It was also determined that the defendant resided at 513 Norton Avenue.

Prior to entering the premises of 513 Norton Avenue, the police had neither an arrest warrant nor a search warrant. (MTS tr. pp. 12, 13 and 27). Evidence taken from the exterior of the car, and submitted to scientific analysis, was used at the trial of petitioner herein and was relied upon exclusively in order to prove his guilt.

Petitioner herein has argued in his original petition for a Writ of Certiorari that the evidence obtained from

his automobile was seized in violation of the Fourth Amendment of the United States Constitution. Respondent has presented two arguments opposing this petition. First, respondent argues that *prior* to the officers' intrusion into the carport, the officers had no probable cause to believe that petitioner's automobile was involved in the hit-and-run accident. Second, respondent argues alternatively that the officers, even without probable cause to search the carport and/or car, were legally authorized to enter the carport. Petitioner respectfully posits that these arguments are in error both factually and legally.

Prior to the officers' intrusion into the carport, the officers had no reason to believe that petitioner's automobile was involved in the hit-and-run accident. The uncontradicted testimony of the investigating officers given at the Motion to Suppress the Evidence held on December 15, 1976, proves that the officers did not have any reason, prior to the intrusion onto petitioner's property, to believe that the petitioner's automobile was the sought-for-automobile. This Court's attention is particularly drawn to the following testimony from the investigating officers:

OFFICER BARKLEY EMMONS:

"We didn't have any reason to believe that it was the car til we saw the front of the car."

Q "You didn't know that this car was the identified vehicle that you received from your dispatcher?"

A "No, sir." (See Motion to Suppress, Dec. 15, 1976, p. 8 — hereinafter referred to as MTS) . . .

Q "Could you tell from the street that this car was the vehicle in the alleged hit-and-run accident?"

A "No, sir." (MTS, p. 9)

"We didn't think it was the car til we checked the front of it." (MTS, p. 13)

Officer Gagliano, when asked by counsel, "Did you think that was the car when you first arrived at the street?" replied "Not when you looked at it from the street." (MTS, p. 28)

Significantly, the description given by the police dispatcher of the sought-for-automobile was a brown Ford (MTS, pp. 5, 24). Petitioner's car is a two-tone Ford (white top, brown bottom).

Petitioner thus submits, and the uncontradicted testimony cited above along with the entire transcript of the Motion to Suppress proves that the investigating officers had no reason, prior to entering on petitioner's property and conducting a search of his carport, to believe that petitioner's automobile was the hit-and-run automobile.

The respondent, given the above facts, alternatively argued that the police had legal authority to enter petitioner's carport. Petitioner respectfully argues that

police officers, with no reason to suspect wrongdoing, may not enter onto private property to engage in "fishing expeditions."

Moreover, petitioner argues that the evidence was seized illegally as the police did not just enter the carport, but, in their own words, "searched the premises." (MTS, p. 31).

The carport, as shown in Defense Exhibit D-3 and D-4, is recessed such that the front boundary of the carport is farther from the street than is the front of the house. Moreover, the carport is fully connected to the house on one side and enclosed by a cement fence on the other. The car itself was parked such that its front bumpers were as close to the back wall of the carport as possible thus positioning the vehicle completely within the confines of the carport.

The carport was used only by the residents of 513 Norton Avenue and was not part of an apartment complex. Furthermore, the carport *was not* used as a passage way to enter the house. There is a door on the back wall of the carport, but this door only leads into a utility shed and not the house. (The Louisiana State Supreme Court erroneously held as a matter of fact that this door was located at the side of the carport and led into the house.)

The investigating officers in this case, not only entered the carport, but, in their own words, "searched

the premises." (MTS, p. 31) Clearly, if a person entered any part of the carport without permission, and searched the area rear of the carport possible charges of attempted burglary, criminal mischief, etc., would lie. In fact, the Louisiana Supreme Court affirmed a burglary conviction in which the facts were similar to the present case. In *State v. Baggett*, 292 So.2d 201 (La. 1974) an outboard motor had been removed from the rear of a boat backed into the victim's carport. The defendants in *Baggett* argued that the carport is not a "structure" and that walking into a carport open to the street is not an "unauthorized entry" prohibited by La. R.S. 14:62, relative to burglary. The Louisiana Supreme Court held that entering into the carport, included within the frame and roof of the house and fenced to prevent entry was "unauthorized" since it was not open to the public with consequent implied consent. See *State v. Baggett*, 292 So.2d at 203 (La. 1974).

Respondents rely upon the case of *Cardwell v. Lewis*, 94 S.Ct. 2464 (1974) as authority for the officers' search herein of the car and carport. *Cardwell*, however, is easily distinguishable and, if anything, supports petitioner's Writ. In *Cardwell*, law enforcement officers had arrested the defendant prior to the seizure of his car. This Court correctly held that "where *probable cause exists* (emphasis added), a warrantless examination of the exterior of a car is not unreasonable under the Fourth and Fourteenth Amendment." *Cardwell, supra*, 417 U.S. at 592. In the case at bar, the officers had no probable cause to approach the automobile. Further, the auto-

mobile in *Cardwell* was parked in a public parking lot. In contrast, the petitioner's automobile was parked in a private carport.

The distinction in the two cases is readily apparent if the knowledge of the two sets of officers is viewed in terms of warrant requirements. If the *Cardwell* investigating officers had proceeded to a magistrate to obtain a search warrant, they could have stated: (1) the car is in a public parking place; (2) the owner is under arrest; (3) the car is the same color as the murder car; (4) there has been repair work performed on the car; and (5) there is a personal connexity between the victim and defendant. See *Cardwell v. Lewis*, 417 U.S. at 587. In stark contrast, the investigating officers in the present case, if they had proceeded to a magistrate to obtain a search warrant prior to intruding into the carport, would have stated: (1) the car is on private property; (2) the owner has not given consent to proceed unto his private property; (3) the owner of this car is unknown; (4) the car color does not match the described color of the hit-and-run vehicle; (5) there is no indication of any repair work performed on the car; (6) there is no evidence of a personal connexity between the victims and the defendant; and (7) the officers have no reason to believe that the petitioner's car is involved in the hit-and-run accident.

Surely, while a magistrate would be correct in signing a search warrant in the *Cardwell* situation, he would be incorrect in the present situation given the above facts.

This Court has warned of the evils of "general, explanatory rummaging in a person's belongings." *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) at 467. It is clear in the present case, that the investigating officers did not have probable cause to approach the car nor were they engaged in legal search. Rather, the officers were engaged in a general, fishing expedition, "rummaging" in the petitioner's belongings. There has been general agreement that "except in certain carefully defined classes of cases, a search of private property without prior consent is "unreasonable" unless it has been authorized by a valid search warrant." *Camara v. Municipal Court*, 387 U.S. 523, 528-529 (1967).

Surely, given the investigating officers' testimony no search warrant would have been issued by a magistrate. The search was illegal and the evidence obtained, it is submitted, should be suppressed.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Louisiana Supreme Court in *State v. Wilbourn*, reported in proceedings No. 62,005 of the Supreme Court of Louisiana.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing have been served on Hon. Harry Connick, District Attorney and Dennis Waldron, Criminal Courts Building, 2700 Tulane Avenue, New Orleans, Louisiana, 70119, by U.S. Mail, postage prepaid, this ____ day of July, 1979.

BRUCE C. ASHLEY, II